Nos. 83-245, 83-291

In The

Supreme Court of the United States

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

vs.

R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND,
Appellant,

vs.

R. A. GRAY & COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF SIBLEY, LINDSAY & CURR COMPANY

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Sibley, Lindsay, and Curr Company ("Sibley's"), through its attorneys, Harris, Beach, Wilcox, Rubin & Levey, respectfully moves this Court for leave to file the accompanying brief as amicus curiae in this appeal. Sibley's brings this motion because appellant, Oregon-Washington Carpenters-Employers Pension Trust Fund, has refused to consent to Sibley's filing a brief amicus curiae. Sibley's has been assessed retroactive withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA") as a result of its withdrawal from a multiemployer

pension plan nearly four months prior to the MPPAA's enactment. Sibley's successfully challenged the constitutionality of the retroactive provisions of the MPPAA in the United States District Court for the Western District of New York. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers*, 566 F.Supp. 32 (W.D.N.Y. 1983). However, on January 9, 1984, the United States Court of Appeals for the Second Circuit reversed District Judge Telesca's decision and upheld the amendment's constitutionality. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers*, No. 83-7328 (2d Cir. Jan. 9, 1984). The facts and circumstances surrounding the retroactive imposition of MPPAA withdrawal liability against Sibley's, however, are distinctly different from the circumstances surrounding the retroactive imposition of MPPAA withdrawal liability against R. A. Gray & Company ("Gray"), the appellee in this appeal.

Sibley's, a division of Associated Dry Goods Corporation, operates retail department stores in Rochester, New York and other upstate New York cities. For many years prior to May 31, 1980, Sibley's operated a bakery at its Main Street, Rochester store.

At all relevant times, the Bakery, Confectionery and Tobacco Workers International Union of America (the "Union") represented bakery employees for purposes of collective bargaining. Pursuant to its collective bargaining agreements with the Union, Sibley's contributed to the Bakery & Confectionery Union & Industry International Pension Fund (the "Fund"). Sibley's never bargained to provide specific pension benefits to its former employees. Rather, Sibley's and the Union agreed that Sibley's contributions to the Fund were to be at a fixed rate, a certain sum for each hour worked by bakery employees. The Fund's trustees were solely responsible for establishing and funding pension benefit levels, and Sibley's never assumed liability should the Fund be unable to finance a certain level of benefits.

Financial losses attributable to its bakery operation compelled Sibley's to close the operation and terminate the employment of forty-three bakery workers on May 31, 1980. Prior to the closing date, Sibley's and the Union negotiated an agreement which fixed Sibley's obligations upon the closing (the "bakery closing agreement"). This agreement required Sibley's to pay its bakery employees for all earned vacation days and unused personal holidays and to pay an additional sum to each employee as severance pay. Sibley's collective bargaining agreement with the Union required it to make contributions to the Fund with respect to hours for which pay was received by bakery employees under the bakery closing agreement. Sibley's and the Union expressly agreed that the bakery closing agreement set forth all of Sibley's obligations under its collective bargaining agreement upon the closing of the bakery. Sibley's completely performed its contractual obligations under the bakery closing and collective bargaining agreements with the Union.

In a letter dated August 29, 1980, the Fund notified Sibley's that its participation in the Fund had terminated on the date the bakery closed, May 31, 1980. At the time Sibley's bakery closed, the Employee Retirement Income Security Act ("ERISA") delineated Sibley's potential liability upon its withdrawal. ERISA imposed no withdrawal liability on Sibley's unless the Fund were to terminate within five years of Sibley's withdrawal and limited Sibley's potential liability to thirty percent of its net worth.

On September 26, 1980, nearly four months after the closing of Sibley's bakery, Congress enacted the MPPAA. The MPPAA radically amended ERISA and retroactively imposed withdrawal liability upon any employer who completely or partially withdrew from a multiemployer pension plan after April 28, 1980. The Fund notified Sibley's by letter dated May 11, 1981 that it had computed Sibley's withdrawal liability to be $315,927.00.

The burden of this retroactive penalty is significant. Sibley's alleged withdrawal liability is three-quarters of its total contributions to the Fund for the ten years prior to its withdrawal. Prior to the bakery closing, Sibley's and the Union had negotiated an agreement which set forth all of Sibley's obligations to its former employees and the Union upon the closing of the bakery. The retroactive assessment of MPPAA withdrawal liability against Sibley's completely abrogated this agreement.

It is the existence of this negotiated agreement limiting Sibley's withdrawal liability that sets Sibley's apart from R. A. Gray & Company. An understanding of the effect of the MPPAA upon Sibley's will provide this Court with a valuable additional perspective in analyzing the constitutionality of this amendment. Sibley's arguments may not otherwise be heard in the course of this appeal.

If Sibley's argument were to be adopted by this Court, the decision of the United States Court of Appeals for the Ninth Circuit holding the MPPAA to be unconstitutional would be affirmed.

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By: ______________________________

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QUESTION PRESENTED

In enacting the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"), did Congress violate the due process clause of the fifth amendment by retroactively imposing substantial withdrawal liability upon employers who withdrew from multiemployer pension plans during the five months prior to the amendment's enactment?

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BRIEF AMICUS CURIAE OF SIBLEY, LINDSAY & CURR COMPANY

INTEREST OF SIBLEY, LINDSAY & CURR COMPANY

Sibley, Lindsay & Curr Company ("Sibley's") presents this Brief Amicus Curiae to assist the Court in determining whether Congress violated the due process clause of the fifth amendment by retroactively imposing withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA") on employers who withdrew from multiemployer pension plans before the MPPAA was enacted on September 26, 1980, but on or after its retroactive effective date of April 29, 1980.

Sibley's is a division of Associated Dry Goods Corporation and operates retail department stores in Rochester, New York and other upstate New York cities. For many years prior to May 31, 1980, Sibley's operated a bakery at its Main Street, Rochester store. Sibley's has been assessed liability in connection with its withdrawal from the pension fund covering its bakery employees during the "window period" between the MPPAA's enactment and its retroactive effective date. Sibley's successfully challenged the MPPAA's constitutionality in the United States District Court for the Western District of New York. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers,* 566 F.Supp. 32 (W.D.N.Y. 1983). However, on January 9, 1984, the United States Court of Appeals for the Second Circuit reversed District Judge Telesca's decision and upheld the amendment's constitutionality. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers,* No. 83-7328 (2d Cir. Jan. 9, 1984).

At all relevant times, the Bakery, Confectionery, and Tobacco Workers' International Union of America (the "Union") represented Sibley's bakery employees for purposes of collective bargaining. Pursuant to contracts negotiated with the Union, Sibley's contributed to the Bakery and Confectionery Union and Industry International Pension Fund (the "Fund"). Sibley's never bargained to provide specific pension benefits to its former employees. Rather, Sibley's and the Union agreed that Sibley's contributions to the Fund were to be at a fixed rate, a certain sum for each hour worked by bakery employees.

Sibley's had no interest or control in the management of the Fund. The Fund's trustees were responsible for establishing and funding pension benefit levels, and Sibley's never assumed liability should the Fund be unable to maintain a certain level of benefits. Sibley's contributions were not related to the level of pension benefits promised by the Fund. Its sole obligation

was to pay the Fund a specified amount per hour worked for each covered employee. Pursuant to its collective bargaining agreements, Sibley's, in the ten years prior to 1980, paid the Fund $445,854.00 on behalf of its bakery employees.

Financial losses attributable to its bakery compelled Sibley's to close the operation. On May 31, 1980, Sibley's closed the bakery and terminated the employment of forty-three bakery workers. Prior to the closing date, Sibley's and the Union negotiated an agreement which fixed Sibley's obligations upon the bakery closing (the "bakery closing agreement"). This agreement required Sibley's to pay its bakery employees for all earned vacation days and all unused personal holidays and to pay an additional sum to each employee as severance pay. Sibley's collective bargaining agreement with the Union required it to make contributions to the Fund with respect to hours for which pay was received by bakery employees under the bakery closing agreement. Sibley's and the Union expressly agreed that the bakery closing agreement set forth all of Sibley's obligations upon the closing of the bakery.

Sibley's completely performed its contractual obligations. It paid its employees for their earned vacation days and unused personal holidays, and it awarded each employee severance pay. On June 3, 1980, Sibley's paid $3,391.36 to the Fund as its contribution for work performed by bakery employees during the month of May, 1980. On July 10, 1980, Sibley's paid the Fund $2,829.12 as its contribution based on the vacation pay paid its former employees under the bakery closing agreement. On August 1, 1980, Sibley's paid $2,803.20 to the Fund as its contribution based on the severance pay paid employees under the bakery closing agreement. Each of these payments represented money paid for, or on account of, services performed prior to June 1, 1980. In a letter dated August 29, 1980, the Fund notified Sibley's that its participation in the Fund had terminated on the date the bakery closed, May 31, 1980.

At the time Sibley's bakery closed, the Employee Retirement Income Security Act ("ERISA") delineated Sibley's potential liability for withdrawal from the Fund. ERISA imposed no withdrawal liability on Sibley's unless the Fund were to terminate within five years of Sibley's withdrawal, 29 U.S.C. §1364(a), and limited Sibley's liability to thirty percent of its net worth. 29 U.S.C. §§1362(b) (2), 1364(b). Under ERISA, the amount of Sibley's potential withdrawal liability would have decreased proportionately each year during the five-year period following withdrawal. 29 U.S.C. §1364(b).

On September 26, 1980, nearly four months after Sibley's closed its bakery, Congress enacted the MPPAA. The MPPAA radically amended ERISA and retroactively imposed withdrawal liability upon any employer who completely or partially withdrew from a multiemployer pension plan on or after April 29, 1980. 29 U.S.C. §§1381 and 1461(e) (2). The MPPAA's retroactive effective date was changed on a number of occasions, and the date ultimately adopted, April 29, 1980, was not fixed in the proposed legislation until June, 1980.

The Fund notified Sibley's for the first time by a letter dated May 11, 1981 that it had computed Sibley's withdrawal liability to be $315,927.00. Sibley's alleged withdrawal liability is its allocable share of the Fund's unfunded vested benefits as calculated by the Fund's trustees. 29 U.S.C. §§1381 and 1391.

The Fund's "unfunded vested benefit liability" is the difference between the value of its assets and its vested benefit liability. 29 U.S.C. §1393(c). A particular multiemployer fund's unfunded vested benefit liability results from a variety of factors outside the control of employers such as Sibley's including: 1) the separation of the benefit setting function (the sole province of the fund trustees) from the contribution setting function (collective bargaining between unions and employers); 2) poor management of a fund's assets and imprudent benefit increases; 3) ERISA's mandatory modification of the vesting

requirements of many multiemployer pension plans; 4) the granting by unions of past service credits to encourage union membership by enlarging the pension benefits of prospective members; and 5) decreases in the value of a fund's assets due to inflation, interest rate fluctuation and other economic factors. Sibley's and other employers are not responsible for the underfunded status of many pension funds, and the burden which the MPPAA retroactively imposed upon them is harsh and inequitable. Sibley's alleged withdrawal liability is three-quarters of its total contribution to the Fund for the ten years prior to its withdrawal.

The bakery closing agreement was signed almost four months prior to the MPPAA's enactment. At that time Sibley's relied upon existing law which would not have imposed withdrawal liability on it unless the Fund terminated within five years of Sibley's withdrawal. 29 U.S.C. §1364. Sibley's did not and could not have anticipated the additional penalty of withdrawal liability.

Sibley's could not have predicted what the final version of the MPPAA would provide, whether it would be passed, or when it would become effective. In early July, 1980, the House and Senate remained at odds over major portions of the new legislation. The Senate did not approve the original House bill, HR 3904, 96th. Cong., 1st Sess. (1979), until July 29, 1980 (two months after Sibley's closed its bakery) and even then attached certain riders and amendments which proved unacceptable to the House. (126 Cong. Rec. S10169 [daily ed. July 29, 1980]). The House reconsidered, a conference report was issued, and final approval of the conference report occurred September 19, 1980. (126 Cong. Rec. H9180 [daily ed. September 19, 1980]). The MPPAA was enacted on September 26, 1980, more than seventeen months after its introduction. During these seventeen months, the most experienced legislative observer could not have predicted the final substance, form or effective date of the MPPAA.

In June, 1982, Sibley's commenced an action in the United States District Court for the Western District of New York seeking a declaration that the MPPAA was unconstitutional and an injunction restraining the Fund and the Union from taking any action to collect Sibley's alleged withdrawal liability. Sibley's motion for a preliminary injunction was converted to a motion for summary judgment. On March 17, 1983, the Hon. Michael A. Telesca granted Sibley's motion for summary judgment, holding that the retroactive application of the MPPAA violated Sibley's right to due process of law guaranteed by the fifth amendment to the United States Constitution. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers,* 566 F.Supp. 32 (W.D.N.Y. 1983). However, on January 9, 1984, the United States Court of Appeals for the Second Circuit reversed District Judge Telesca's decision and upheld the amendment's constitutionality. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers,* No. 83-7328 (2d Cir. Jan. 9, 1984).

SUMMARY OF ARGUMENT

The retroactive imposition of withdrawal liability under the MPPAA is not a rational means to accomplish a legitimate governmental purpose. The retroactive application of the MPPAA abrogated Sibley's valuable contract rights and retroactively imposed a substantial economic penalty against Sibley's for a transaction completed well before the MPPAA's enactment.

No public need supported the MPPAA's harsh retroactive penalties. The fear of opportunistic withdrawals (the alleged evil to be averted by retroactive application of the MPPAA) was not well founded. Every employer was bound by a collective bargaining agreement and was required to comply with various notice provisions prior to any withdrawal. No

employer was free to withdraw unilaterally simply to avoid withdrawal liability. In fact, Congress manipulated the MPPAA's retroactive effective date, not to advance any legitimate public purpose, but to exempt certain politically powerful employers who were caught by the originally proposed date from the MPPAA's harsh economic penalties.

The United States Court of Appeals for the Ninth Circuit, applying the *Nachman* analysis, correctly determined that the MPPAA violates the due process clause of the fifth amendment. In negotiating its bakery closing agreement, Sibley's justifiably relied on the then existing provisions of ERISA which imposed withdrawal liability only in the unlikely event that the Fund became insolvent within five years. In contrast, no one reasonably could have relied upon Sibley's to guarantee payment of pension benefits considering its very limited contractual obligation to make contributions per unit of employee labor to the Fund. Although the MPPAA affects an area subject to previous legislation, no employer reasonably could have anticipated the MPPAA's effective date or the extent of the liability that it imposed, because its burdens are entirely different and much more severe than those imposed by ERISA. It is inequitable to impose liability retroactively upon withdrawing employers because only the trustees of underfunded multiemployer plans, who fix benefit levels and invest the fund's assets, can be blamed for a particular fund's poor financial status. Unlike ERISA, the MPPAA is devoid of any provisions designed to limit and moderate the impact of its burdens. Based on a careful consideration of all the relevant factors, this Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit declaring the retroactive application of the MPPAA to be unconstitutional.

ARGUMENT

I.

THE MPPAA IS UNCONSTITUTIONAL BECAUSE IT IS NOT A RATIONAL MEANS OF ACCOMPLISHING A LEGITIMATE GOVERNMENTAL PURPOSE.

The MPPAA dramatically modified ERISA and imposed a substantial penalty, equal to a portion of a multiemployer pension fund's total unfunded vested benefit liability, upon employers who withdrew from multiemployer pension plans after April 28, 1980, a date nearly five months prior to the MPPAA's enactment. 29 U.S.C. §1461(e) (2) (A). The imposition of this retroactive penalty violated Sibley's right to due process of law guaranteed by the fifth amendment.

Although Congress' power to enact economic legislation is substantial, it is not without limitation. The due process clause of the fifth amendment prohibits harsh and oppressive retroactive legislation, *Welch v. Henry,* 305 U.S. 134 (1938), and demands that retroactive legislation represent a rational means of accomplishing a legitimate governmental purpose. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976).

The danger of arbitrary and oppressive legislative action is particularly great where Congress exerts its powers retroactively. Retroactive legislation reaches back to attach new rights and duties to already completed transactions. Congress may act retroactively with an exact knowledge of who will benefit and who will suffer from its acts. *Adams Nursing Home of Williamstown v. Matthews,* 548 F.2d 1077, 1080 (1st Cir. 1977). Retroactive legislation undermines the stability of past transactions, destroys the value of the statutory law as a guide to individual conduct, and contravenes the strong common law tradition that a legislature's function is to declare law for the future. *Adams Nursing Home of Williamstown,* 548 F.2d at 1080; *Leedom v. International Brotherhood of Electrical*

Workers, 278 F.2d 237, 240 (D.C. Cir. 1960). *See also* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv. L. Rev. 692 (1960). Thus, Congress' power to legislate retroactively is considerably less than its power to legislate prospectively. *Turner Elkhorn Mining Co.*, 428 U.S. at 16.

Sibley's experience demonstrates the devastating effect which retroactive legislation such as the MPPAA has on predictability and reliance. Prior to closing its bakery, Sibley's negotiated an agreement with the Union which delineated the full extent of Sibley's responsibilities to its employees and the Union upon the bakery closing. Long after Sibley's had fulfilled its contractual obligations under its bakery closing and collective bargaining agreements, Congress enacted the MPPAA. The MPPAA grossly distorted Sibley's obligations to the Fund, the Union and former bakery employees by superimposing sudden, totally unanticipated and substantial retroactive obligations upon Sibley's, substantially beyond the terms of its agreements with the Union. This Court has found similar retroactive state legislation to be harsh and arbitrary and, therefore, unconstitutional under the contracts clause. *Allied Structural Steel v. Spannaus,* 438 U.S. 234 (1978).

No public need supported the MPPAA's harsh retroactive penalties. There is no merit to the argument that retroactive liability was necessary to prevent employers from withdrawing prior to the MPPAA's enactment merely to avoid liability. "No employer was free to withdraw just because he wanted to. Every employer was bound by a collective-bargaining agreement and bound by various notice provisions required to precede any withdrawal." *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California,* 543 F. Supp. 1234, 1254 (C.D. Calif. 1982), *aff'd,* 705 F.2d 1502 (9th Cir.), *petition for cert. filed,* 52 U.S.L.W. 3268 (Sept. 24, 1983). There was no showing that massive employer withdrawals had

occurred or were imminent. In fact, the MPPAA's retroactive effective date was moved from the originally proposed February 27, 1979 to April 29, 1980, not to discourage employer withdrawals, but rather to benefit politically powerful withdrawing employers "who were caught by the [originally proposed] date." 126 Cong. Rec. S10101 (daily ed. July 29, 1980) (remarks of Sen. Javits).

The MPPAA imposed significant burdens much broader than those needed to discourage withdrawals by opportunistic employers. Although the retroactive application of the MPPAA purports to penalize only those opportunistic employers who might have withdrawn from a multiemployer plan simply to avoid withdrawal liability, the amendment also penalizes employers, such as Sibley's and Gray, who were forced to respond to pressing economic circumstances and necessarily and justifiably relied on the existing state of the law. Retroactive imposition of withdrawal liability on employers who withdrew from multiemployer plans for legitimate business purposes was not a rational means to prevent the withdrawal of opportunistic employers. *See Railroad Retirement Board v. Alton Railroad,* 295 U.S. 330, 348-49 (1935). The forced payment under the MPPAA of added sums for services already fully compensated is arbitrary, inequitable and fails to fulfill any legitimate governmental purpose in violation of the due process clause of the fifth amendment.

II.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, APPLYING THE *NACHMAN* ANALYSIS, CORRECTLY DETERMINED THAT THE MPPAA AS RETROACTIVELY APPLIED VIOLATES THE DUE PROCESS CLAUSE.

In reviewing the constitutionality of the MPPAA, the court below applied a test which was uniquely suited for analyzing

retroactive pension legislation — the four part rationality test first articulated by the United States Court of Appeals for the Seventh Circuit in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional question*, 442 U.S. 940 (1979), *aff'd on statutory holding*, 446 U.S. 359 (1980). In *Nachman*, the court examined the constitutionality of the retroactive aspects of ERISA. The court articulated four factors to be considered in evaluating the "rationality" of retroactive federal legislation: (1) the reliance interest of the parties affected; (2) whether the impairment of the private interest occurs in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burden; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burden. *Nachman*, 592 F.2d at 960. Applying the *Nachman* analysis, the court below correctly held that Congress violated the due process clause of the fifth amendment by retroactively imposing substantial economic penalties upon employers who withdrew from multi-employer plans prior to the MPPAA's enactment.

Recently, the Seventh Circuit upheld the retroactive imposition of withdrawal liability under the MPPAA. *Peick v. Pension Benefit Guaranty Corp.*, No. 82-2081 (7th Cir. December 19, 1983). In *Peick*, the court declined to examine the constitutionality of the MPPAA under the analysis it previously had articulated in *Nachman* and instead applied the "arbitrary and irrational" standard of *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). To determine whether federal legislation is "arbitrary and irrational" requires a comparison of the problem to be solved with the remedy Congress has devised. In comparing the MPPAA's drastic retroactive provisions with the problem it purports to remedy, this Court should consider all relevant factors, including the four factors articulated in *Nachman*. Failure to do so ultimately might preclude meaningful scrutiny of the legislative process — a result prohibited by the due process clause of the fifth amendment.

The *Nachman* factors provide a sound analytical framework for analyzing retroactive legislation under both the contracts clause and the due process clause of the fifth amendment. Several courts of appeals, including the Seventh Circuit in *Peick*, have recognized that the basic principles which have developed under the contract clause are applicable in a due process analysis. *Peick v. Pension Benefit Guaranty Corp.*, No. 82-2081, slip op. at 29 (7th Cir. December 19, 1983); *A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1024 (6th Cir. 1980). Indeed, the Ninth Circuit has held that "the fifth amendment's due process clause provides essentially the same restraint against federal impairment of the obligation of contracts" as does the contract clause. *Northwestern National Life Insurance Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104, 106 (9th Cir. 1980). Thus, the factors articulated in *Nachman* provide a well-reasoned and logical basis for examining retroactive federal legislation under the fifth amendment.

In evaluating the "rationality" of the retroactive application of the MPPAA, this Court should consider all relevant factors including the four factors articulated in *Nachman*. The Fourth Circuit, albeit with a different result, has joined the Ninth Circuit in applying the *Nachman* analysis in analyzing the constitutionality of the MPPAA. *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3293 (Sept. 29, 1983). Indeed, several courts have considered this Court's decision in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980) to be a *sub silentio* affirmance of the *Nachman* analysis. *See, e.g., A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1024 (1st Cir. 1980). After reviewing the facts surrounding the retroactive imposition of withdrawal liability upon Sibley's, this Court should conclude that the MPPAA is not a rational means to

accomplish a legitimate governmental purpose and, therefore, violates the due process clause of the fifth amendment.

First to be considered are the reliance interests of the affected parties. For financial reasons, Sibley's decided to close its bakery and negotiated an agreement which it believed fixed its entire obligations upon the closing. In negotiating this agreement, Sibley's justifiably relied on the then existing provisions of ERISA which imposed withdrawal liability only in the unlikely event that the Fund became insolvent in the next five years and limited Sibley's withdrawal liability to thirty percent of its net worth. Sibley's honored its commitments under this agreement and, in return, reasonably expected that its rights under the agreement would be honored and protected.

Sibley's cannot be held to have anticipated the new legislation. Congress considered the MPPAA, in a variety of forms, for eighteen months. While the bill was pending it was referred from committee to committee and repeatedly modified. "Outside of the tax area, there is no authority that imposes on anyone the burden of predicting Congressional action." *Shelter Framing Corp.*, 543 F. Supp. at 1249. "Forecasting congressional action (or lack of action) is akin to forecasting the weather or the stock market. There are simply too many unpredictable variables involved." *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers*, 566 F. Supp. 32, 35-36 (W.D.N.Y. 1983), *reversed*, No. 83-7328 (2d Cir. Jan. 9, 1984). Sibley's and other employers could not be expected to suspend all business decisions while Congress contemplated amendments to ERISA.

No employer reasonably could have anticipated the MP-PAA's effective date or the extent of the liability it imposed. ERISA's provisions regarding withdrawal liability were benign compared to the harsh penalties ultimately imposed by the MPPAA, and familiarity with ERISA would not have placed an employer on notice of the MPPAA's radically different provisions.

In measuring the reliance interests of a party, this Court should consider what that party might have done if informed that certain legislation was forthcoming. *Welch v. Henry*, 305 U.S. 134 (1938). Sibley's might have continued to operate its bakery, accepting the bakery's financial losses to avoid the substantial penalty imposed by the MPPAA. Knowledge of its potential withdrawal liability could have influenced the terms of the agreement Sibley's negotiated with the Union upon the bakery closing. Sibley's might have avoided liability completely by selling the bakery's assets to a company which participated in the plan and intended to remain in business. 29 U.S.C. §1384. Finally, Sibley's might have withdrawn from the Fund gradually and avoided liability entirely, 29 U.S.C. §1385, or withdrawn partially and lessened its withdrawal liability, 29 U.S.C. §1386. Some of these alternatives were more likely than others, but at the very least, if Sibley's had been notified of its potential liability, it could have made an informed decision.

In contrast, the reliance interests of the Fund and Sibley's former employees are comparatively slight. Given Sibley's very limited contractual obligation to make specified contributions per unit of employee labor to the Fund, no one reasonably could have expected Sibley's to guarantee payment of any pension benefits. Any promises regarding benefit levels upon which the bakery employees might have relied were made by the Fund's trustees, not by Sibley's.

The second element, whether the interests impaired by the retroactive features of the legislation are in an area previously subjected to regulation, is actually another means of analyzing the parties' reliance interests. Previous regulation affects the expectations of the party upon whom the burden of the retroactive legislation falls. "[F]or retroactive legislation in a previously regulated area to be valid, the new and more burdensome legislation must be closely akin in type and scope to the prior legislation." *Shelter Framing Corp.*, 543 F. Supp. at 1251.

The burdens imposed by the MPPAA, however, are entirely different and much more severe than those imposed by ERISA. An employer's withdrawal liability under ERISA was contingent upon the termination of the pension fund within five years of the employer's withdrawal. 29 U.S.C. §1364. In contrast, withdrawal liability under the MPPAA is absolute, because it is triggered by an employer's withdrawal from a multiemployer pension fund, regardless of that fund's solvency. Unlike ERISA, the MPPAA does not limit an employer's liability to thirty percent of its net worth. As the Court of Appeals for the Ninth Circuit has noted, the MPPAA, as retroactively applied, goes "far beyond a clarification or modest modification of ERISA." *Shelter Framing Corp.*, 705 F.2d at 1512. Although the MPPAA affects a previously regulated area, Sibley's and other employers could not have foreseen the imposition of liability of this magnitude, particularly for transactions completed well before the MPPAA's enactment.

Third, the equities tip decidedly in favor of employers such as Sibley's. It is inequitable to require employers to bear the burden of retroactive withdrawal liability. Employers who contribute to multiemployer pension plans are not responsible for the problem which the MPPAA seeks to rectify. Only the trustees of an underfunded multiemployer pension plan can be blamed for that fund's unfunded vested benefits liability. The trustees fix benefit levels, make investments and control the number of employees with vested benefits. It is the trustees to whom the employees should look for relief.

It is particularly inequitable to require Sibley's to bear the burden of retroactive withdrawal liability. Sibley's prewithdrawal payments to the Fund represented a portion of a total compensation package negotiated at arms-length with the Union. Forced payment of added compensation for services already fully compensated is arbitrary and inequitable. *See Allied Structural Steel Company v. Spannaus*, 438 U.S. 234

(1978). Furthermore, Sibley's withdrawal liability is not measured with reference to contributions made over the years on behalf of its employees. Rather, it is a function of the Fund's unfunded vested benefits liability with respect to the Union's members nationwide.

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), this Court upheld the constitutionality of a federal statute which required coal companies to pay black lung benefits to former employees. The court characterized such payments as "an actual, measurable cost" of doing business. 428 U.S. at 20. The economic burden at issue in *Turner Elkhorn* was minimal when compared to the oppressive and potentially limitless economic liability imposed by the MPPAA on withdrawing employers. Furthermore, withdrawal liability is not an "actual, measurable cost" of doing business but results from the establishment of unrealistic and financially imprudent benefit levels and poor asset management by the trustees and managers of certain multiemployer plans.

As the Court of Appeals for the Ninth Circuit noted, the burden imposed on employers by the MPPAA, " . . . lacks the justification present" in *Turner Elkhorn*. *Shelter Framing Corp. v. Carpenters Pension Trust For Southern California*, 705 F.2d 1502, 1513 (9th Cir. 1983). The portion of a fund's unfunded vested benefits liability allocated to a withdrawing employer is not limited to the share attributable to its former employees but includes the share of benefits due workers in other states employed by other companies without any relationship to the withdrawing employer. Withdrawal liability cannot be considered a cost of doing business.

Furthermore, the purpose of the black lung statute was compensatory. For decades, the mine operators had "clearly been aware of the danger" to which they were exposing their employees. *Turner Elkhorn Mining Co.*, 428 U.S. at 17. The black lung statute was designed to require all responsible

parties to share in the cost of specific harm they had inflicted in the past, "not simply to increase or supplement a former employee's salary to meet his generalized need for funds." *Turner Elkhorn Mining Co.*, 428 U.S. at 19.

In contrast, the significant withdrawal liability which Sibley's and other similarly situated employers must bear is an unbargained for benefit for union members, unions and multi-employer pension plans. Sibley's and other employers never guaranteed a specific level of pension benefit levels, but rather agreed only to make fixed contributions to particular multi-employer funds. The fund trustees had sole responsibility for investing the contributed funds and setting benefit levels. When Sibley's decided to close its bakery, it negotiated an agreement with the Union which both agreed reflected Sibley's entire liability under its collective bargaining agreement. The MP-PAA abrogated this agreement and retroactively imposed upon Sibley's a substantial economic penalty in violation of the due process clause of the fifth amendment.

In *Borden, Inc. v. United Dairy Workers Pension Program*, 517 F. Supp. 1162 (1981), the United States District Court for the Eastern District of Michigan enjoined trustees of a multi-employer pension plan from increasing benefits in such a manner as to render that plan less than fully funded. 517 F. Supp. at 1166. The court forbade the plan's trustees to "regress the status of the fund when to do so would impose unbargained for liability on the employer plaintiff." *Id.* Similarly, it is inequitable to burden Sibley's and other employers with the responsibility for insuring that former employees of unrelated companies are paid a level of benefits fixed by fund trustees.

Finally, the MPPAA is devoid of any provisions designed to limit and moderate the impact of its burdens, an omission which the Court of Appeals for the Ninth Circuit found to be the most significant distinction between the MPPAA and the original ERISA provisions. *Shelter Framing Corp.*, 705 F.2d at

1514. Under ERISA, an employer incurred withdrawal liability only under limited circumstances and in a limited amount. The PBGC was empowered to waive, modify or defer an employer's liability and offered low cost insurance to employers to cover potential future liability. An employer could avoid withdrawal liability entirely if the fund remained solvent for five years after withdrawal and, in any event, an employer's potential liability was limited to thirty percent of its net worth. Similarly, in *Turner Elkhorn Mining Co.*, this Court noted that the retroactive burden of the black lung statute was lessened considerably because the federal government had assumed "a substantial portion" of the economic burden imposed by the legislation. 428 U.S. at 18.

The MPPAA contains none of these moderating provisions and, in fact, exacerbates the harms by imposing withdrawal liability retroactively. Employers weighing their alternatives after the MPPAA's enactment were able to consider selling or gradually phasing out their operations as described above. However, employers such as Sibley's who ceased covered operations prior to the MPPAA's enactment were unable to make an informed decision regarding these options. Technically, an employer might avoid liability by rejoining the fund. For Sibley's, this option is unrealistic since it closed its bakery in May, 1980, more than three years ago. The opportunity to pay withdrawal liability in monthly installments (with interest) does not moderate the severity of Sibley's alleged withdrawal liability or improve its present financial position. There is, "little, if any, comfort for the employers in these provisions." *Shelter Framing*, 705 F.2d at 1514. The MPPAA is harsh and arbitrary. It is not a rational means to accomplish a legitimate governmental purpose and, therefore, violates the due process clause of the fifth amendment.

CONCLUSION

Retroactive imposition of MPPAA withdrawal liability abrogated Sibley's contractual rights under its bakery closing and collective bargaining agreements with the Union. The MPPAA retroactively imposed a substantial economic penalty upon Sibley's for closing its bakery, a legitimate business decision, and was not a rational means to accomplish a legitimate governmental purpose. Therefore, it is respectfully submitted that this Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit holding that the MPPAA as applied retroactively violates the due process clause of the fifth amendment.

Respectively submitted,

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